STATE OF CALIFORNIA

IBLA 76-371 Decided February 23, 1977

Appeal from a decision of the California State Office, Bureau of Land Management, rejecting swampland grant application CA 2276.

Affirmed as modified.

1. Swamplands

Land, which in its natural condition, quite apart from any overflow of water, is uncultivable, is not land of the character described in the grant of Swamplands to the respective States.

APPEARANCES: Steven C. Lindfeldt, Esq., Staff Counsel, State Lands Commission, State of California, for the appellant.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

The State of California has appealed from the decision of the California State Office, Bureau of Land Management, dated November 19, 1975, rejecting its swampland grant application CA 2276. On August 13, 1974, the State of California made application under the Swamp Lands Act of September 28, 1850, 9 Stat. 520, as amended, 43 U.S.C. § 982 (1970), for the following lands: E 1/2 NE 1/4, NE 1/4 SE 1/4 sec. 22; W 1/2, W 1/2 NE 1/4, SE 1/4 NE 1/4, SE 1/4 sec. 23; NW 1/4 SW 1/4, S 1/2 SW 1/4, SW 1/4 SE 1/4 sec. 24; NW 1/4, NW 1/4 NE 1/4 sec. 25; and N 1/2, NE 1/4 SW 1/4, N 1/2 SE 1/4 sec. 26, T. 14 S., R. 38 E., M.D.M., California. Of the lands sought by the State of California, SW 1/4 sec. 23, and N 1/2 sec. 26 had been patented to mineral entrymen in 1918. The other lands were still in federal ownership.

In its decision of November 19, 1975, the State Office noted that the area sought by appellant had been designated as "salt marsh" on the official plat of survey which had been returned on June 1, 1880. The decision then recited a portion of the "General Description" found in the field notes:

> * * * The salt marsh situated in portions of Sections 22, 23, 24, 25, 26 and 27 is fed by a fine mountain stream running through Sec. 22 and a large spring near the center of Sec. 27. The salt is of the finest quality and no refining for family use is needed.
>
> It is from 8 to 22 inches deep over the whole marsh.

The State Office concluded that the designation of "salt marsh" on the plat of survey did not indicate, in this case, that the land was swampland, but rather pointed out the existence of salt deposits as surveyors are required to note in the field notes.

The decision of the State Office then discussed the historical use of the lands, particularly its mining for salt and the subsequent applications for mineral patent under the Saline Placer Act of January 31, 1901, 31 Stat. 745, 30 U.S.C. § 162 (1970). The State Office noted that the patent applications had declared that the lands were, at times of high water caused by rain, covered with a saturated solution of brine, which upon its evaporation in the spring, summer and fall, deposited salt upon the surface of the area. The State Office concluded that the lands were "subject to periodical overflow" rather than "overflowed" and therefore were not within the contemplated grant of swamp and overflowed lands, citing Heath v. Wallace, 138 U.S. 573 (1891).

The State of California argues on appeal that the BLM erred as regards both the law and the facts in this matter. First it argues that while the periodic overflow might not, in and of itself, be deemed sufficient to classify the lands as swamp and overflowed within the meaning of the statute, "it may be considered in determining whether the lands are too wet for cultivation." They cite various departmental cases for this proposition, including Rake v. State of Iowa, 13 L.D. 344 (1891) and State of Mississippi v. United States, 48 L.D. 421 (1921). The primary question from the State of California's perspective is whether or not the land is too wet to cultivate.

Factually, the State argues that the BLM misinterpreted the statements made by the mineral claimants in their affidavits, arguing that various dams, ditches and levees were constructed to prevent salt and other impurities from being carried on to the claim, and not, as BLM contended, to increase the water flow into the claims.

Upon examination of this case, however, we find it unnecessary to resolve these contentions. Rather, we hold that for a totally different reason, a reason going to the purpose and nature of the Swamp Lands Act, the State of California's application must be rejected.

The purpose of the Swamp Lands Act of 1850 is not difficult to ascertain. In Leovy v. United States, 177 U.S. 621 (1900), the United States Supreme Court noted:

> This legislation declares a public policy on the part of the government to aid the States in reclaiming swamp and overflowed lands, unfit for cultivation in their natural state, and is a recognition of the right and duty of the respective States, in consideration of such grants, to make and maintain the necessary improvements.

177 U.S. at 623.

The Act was a recognition of the fact that much public land, due to its natural condition as swamp and overflowed land, was not, in its natural state, amenable to cultivation and in order to foster its reclamation the United States granted to the various States the land with the understanding that the States had "the right and duty" to make and maintain the necessary improvements.

There is a basic assumption which runs through the Act: that the land is made unfit for cultivation by reason of its swamp or overflowed character. Thus, the Act itself states:

> To enable the several States * * * to construct the necessary levees and drains, to reclaim the swamp and overflowed lands therein -- the whole of the swamp and overflowed lands, made unfit thereby for cultivation * * * are granted and belong to the several States respectively, in which said lands are situated * * *.

Act of September 28, 1850, 9 Stat. 520, 43 U.S.C. § 982 (1970) (Emphasis supplied).

The question which this case poses is whether land, which in its natural condition, quite apart from any overflow of water, is not cultivable, may still be considered to be swamp and overflowed land within the meaning of the Swamp Lands Act, supra. We believe the answer to this question is in the negative.

First of all, to allow such lands to be selected under the Swamp Lands Act would not further the major purpose of that act which was to provide the respective States with both the incentive and ability to reclaim land for agricultural cultivation. While it is true that there is no requirement that such lands be

successfully cultivated subsequent to the grant to the State, the Act clearly presupposes the possibility of such reclamation. 1/

Moreover, the consistent Departmental interpretation of the Act has been one which requires "proof that the land is not 'susceptible of cultivation in grain or other staple productions' by reason of the overflow." Keeran v. Griffith, 31 Cal. 462, 466 (1866), citing Commissioner of the General Land Office Circular of February 11, 1856, Lester's Land Laws, Vol. I at 545. 2/

This precise issue has arisen in the past. In State of California, 15 L.D. 428 (1892) Secretary Noble expressly ruled that "if it is shown * * * that the reclamation of such lands would not fit them for cultivation, but, on the contrary, would destroy their chief value, and that it was not the intention of the State to reclaim them, its claim should be rejected." Id. at 430. Secretary Noble noted:

> The reclamation of the land was the consideration for the grant to the State, and clearly it could not have been contemplated that lands, whose chief value derived from the overflow, and whose value would be destroyed by drainage, were of the character described in the grant.

15 L.D. at 429 (emphasis in the original).

In the instant case the field notes showed a salt deposit throughout the lands sought in depths varying from 8 to 22 inches.

1/ The Report of the Public Land Commission, entitled The Public Domain, revised July 16, 1881, gave three reasons for the grant of swamplands to the States. They were:

"1. the alleged worthless character of the premises in their natural condition, and the inexpediency of an attempt to reclaim them by direct national interposition.

"2. The great sanitary improvement to be derived from the reclamation of extensive districts notoriously malarial, and the probable occupancy and cultivation that would follow.

"3. The enhancement in value, and readier sale, of adjoining Government property."

It is clear that the grant of the lands involved herein would foster none of these objectives.

2/ Indeed, it could be noted that among the interrogatories which were to be propounded to each witness was the following:

"State whether successfully to cultivate said land, it would be necessary to use artificial means? if so, what, and to what extent."

Lester's Land Laws, Vol. I at 547.

Furthermore, in its brief appellant basically admits that the land is not cultivable because of the salinity of the soil. Thus, the brief states: "It is readily apparent from the description that even if the salinity of the soil were low enough to permit cultivation this would not be possible because of the amount of water present." Statement of Reasons for Appeal at 5. Nor can it be said that the State has evidenced any intention to reclaim the land for agricultural production. In view of this it is our view that regardless of whether or not the land is deemed to be swamp or overflowed within the meaning of the Act, the land is not thereby rendered unfit for cultivation, and thus the land is not of the character described in the Swamp Lands Act, supra.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the California State Office is affirmed for the reason set forth above.

Douglas E. Henriques
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Anne Poindexter Lewis
Administrative Judge